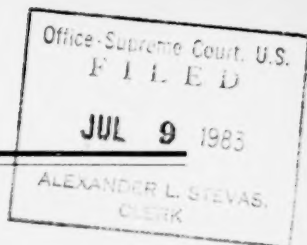


83-50

No. \_\_\_\_\_



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

GROLIER INCORPORATED, et al.,  
*Petitioners,*

v.

FEDERAL TRADE COMMISSION,  
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## **QUESTIONS PRESENTED**

### **FIRST AMENDMENT ISSUES RELATING TO THE REMEDY**

1. In reviewing a Federal Trade Commission remedial order which impinges upon petitioners' First Amendment rights, did the Court of Appeals for the Ninth Circuit err by applying a standard of review merely requiring that the remedy be reasonably related to the violations rather than the appropriate standard of review which provides that the remedy must contain the least restrictive alternative sufficient to accomplish the governmental purpose of preventing deception.

### **ISSUES REGARDING THE DISQUALIFICATION OF THE ADMINISTRATIVE LAW JUDGE**

2. Where an administrative law judge (ALJ) presiding over an agency adjudicative proceeding formerly served for eight years as attorney-advisor to an agency commissioner who participated in the prosecution and/or investigation that resulted in that proceeding, does the Administrative Procedure Act and/or the Due Process Clause of the Fifth Amendment mandate the ALJ's disqualification?

## **PARTIES TO THE PROCEEDING**

The following companies were respondents in the administrative proceeding below, and are petitioners herein: Grolier Incorporated; American Peoples Press, Inc.; Americana Corporation; Americana Interstate Corporation; Career Institute, Inc.; Federated Credit Corp.; Grolier Enterprises, Inc.; Grolier Interstate, Inc.; Grolier New Era Corp.; Grolier Reading Program, Inc.; Madison Enterprises, Inc.; R.H. Hinkley Company; Spencer International Press, Inc.; The Grolier Society, Inc.; and Richards Company, Inc. Respondent herein is the Federal Trade Commission.<sup>1</sup>

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<sup>1</sup> Pursuant to Supreme Court Rule 28.1, petitioners hereby inform the Court that petitioners have no parent companies, subsidiaries (except wholly-owned subsidiaries) or affiliates.

## TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED.....	i
PARTIES TO THE PROCEEDING.....	i
TABLE OF AUTHORITIES.....	iii
OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	3
The FTC Proceedings.....	7
Grolier I.....	8
The FTC Proceedings On Remand.....	9
Grolier II.....	9
REASONS FOR GRANTING THE WRIT.....	10
I.    The Writ Should Be Granted Because The Judgment Below Conflicts With The First Amendment Principles Enunciated By This Court Applicable To Orders Restricting Commercial Speech.....	10
II.   The Writ Should Be Granted To Resolve A Conflict In The Decisions Of Various Courts Of Appeals Regarding The Standard Of Review To Be Applied To Federal Trade Commission Orders Restricting Speech.....	12
III.  The Writ Should Be Granted To Decide An Important Question Of Federal Law Regarding The Reach Of The Prohibition Against Commingling Of Functions Within An Administrative Agency.....	15
IV.   The Writ Should Be Granted To Decide An Important Issue Arising Under The Due Process Clause Of The Fifth Amendment Regarding The Commingling Of Prosecutorial And Judicial Functions In A Single ALJ.....	21
CONCLUSION.....	24

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE(S)</u>
<i>American Cyanamid Co. v. FTC</i> , 363 F.2d 757 (6th Cir. 1966) .....	23
<i>American General Ins. Co. v. FTC</i> , 589 F.2d 462 (9th Cir. 1979) .....	22
<i>American Home Prods. Corp. v. FTC</i> , 695 F.2d 681 (3d Cir. 1982) .....	13
<i>Amos Treat &amp; Co. v. SEC</i> , 306 F.2d 260 (D.C.Cir. 1962) .....	16, 21
<i>Au Yi Lau v. I.N.S.</i> , 555 F.2d 1036 (D.C.Cir. 1977) .....	17
<i>Beneficial Corp. v. FTC</i> , 542 F.2d 611 (3d Cir. 1976), <i>cert. denied</i> , 430 U.S. 983 (1977) .....	12
<i>Butz v. Economou</i> , 438 U.S. 478 (1978) .....	16
<i>Central Hudson Gas Corp. v. Public Service Comm'n of N.Y.</i> , 447 U.S. 557 (1980) .....	10, 11
<i>Cinderella Career &amp; Finishing Schools, Inc. v. FTC</i> , 425 F.2d 583 (D.C.Cir. 1970) .....	22
<i>Encyclopaedia Britannica, Inc. v. FTC</i> , 605 F.2d 964 (7th Cir. 1979), <i>cert. denied</i> , 445 U.S. 934 (1980) .....	5, 14
<i>Encyclopaedia Britannica, Inc.</i> , FTC Dkt. No. 8909 .....	5, 6, 7
<i>Fredonia Broadcasting Corp., Inc. v. RCA Corp.</i> , 569 F.2d 251 (5th Cir. 1978) .....	20
<i>Grolier Incorporated v. FTC</i> , 615 F.2d 1215 (9th Cir. 1980) .....	2, 8, 17, 18, 19, 20, 21
<i>Grolier Incorporated v. FTC</i> , 699 F.2d 983 (9th Cir. 1983) .....	1, 7, 9, 19, 20, 23
<i>Grolier Incorporated</i> , 99 F.T.C. 379 (1982) .....	1
<i>Grolier Incorporated</i> , 91 F.T.C. 476 (1978) .....	1
<i>Hampton v. Hanrahan</i> , 499 F.Supp. 640 (N.D.Ill 1980) .....	23
<i>R. A. Holman &amp; Co. v. SEC</i> , 366 F.2d 446 (2d Cir. 1966), <i>modified</i> , 377 F.2d 665 (2d Cir.), <i>cert. denied</i> , 389 U.S. 991 (1967) .....	21
<i>In re Murchison</i> , 349 U.S. 143 (1955) .....	22
<i>In the Matter of RMJ</i> , 455 U.S. 191 (1982) .....	11
<i>The Kroger Co.</i> , 98 F.T.C. 639 (1981) .....	12
<i>The Kroger Co.</i> , FTC Dkt. No. 9102 .....	18
<i>Litton Indus., Inc. v. FTC</i> , 676 F.2d (9th Cir. 1982) .....	14
<i>Marshall v. Georgia Pacific Corp.</i> , 484 F.Supp 629 (E.D.Ark. 1980) .....	23

<u>CASES</u>	<u>PAGE(S)</u>
<i>Memphis Pub. Co. v. Leech</i> , 539 F.Supp. 405 (W.D.Tenn. 1982) .....	6
<i>Nash v. Califano</i> , 613 F.2d 10 (2d Cir. 1980).....	16
<i>National Comm'n on Egg Nutrition v. FTC</i> , 570 F.2d 157 (7th Cir. 1977), <i>cert. denied</i> , 439 U.S. 821 (1978) .....	14
<i>National Talent Associates, Inc.</i> , 1976-79 CCH Transfer Binder, ¶21,366 (1977) .....	18
<i>Pregent v. New Hampshire Dep't of Employment</i> , 361 F.Supp. 782 (D.N.H. 1973) .....	22
<i>Roberts v. Ace Hardware, Inc.</i> , 515 F.Supp. 29 (N.D. Ohio 1981) .....	23
<i>Schloetter v. Railoc of Indiana, Inc.</i> , 546 F.2d 710 (7th Cir. 1976) .....	20
<i>Standard Oil Co. of Calif. v. FTC</i> , 577 F.2d 710 (7th Cir. 1976) .....	14
<i>Texaco, Inc. v. FTC</i> , 336 F.2d 754 (D.C.Cir. 1964), <i>vacated</i> , 381 U.S. 739 (1965).....	22
<i>Trans World Airlines, Inc. v. CAB</i> , 254 F.2d 90 (D.C.Cir. 1958) .....	22
<i>United States v. Amerine</i> , 411 F.2d 1130 (6th Cir. 1969) .....	23
<i>United States v. Reader's Digest Ass'n</i> , 464 F.Supp. 1037 (D.Del. 1978), <i>aff'd</i> , 662 F.2d 955 (3d Cir. 1981), <i>cert. denied</i> , 455 U.S. 908 (1982) .....	11
<i>United States v. Reader's Digest Ass'n</i> , 662 F.2d 955 (3d Cir. 1981), <i>cert. denied</i> , 455 U.S. 908 (1982) .....	13
<i>United States Health Club, Inc. v. Major</i> , 292 F.2d 665 (3d Cir.), <i>cert. denied</i> , 368 U.S. 896 (1962) .....	16
<i>Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.</i> , 425 U.S. 748 (1976) .....	12
<i>Warner-Lambert Co., Inc. v. FTC</i> , 562 F.2d 749 (D.C.Cir. 1977), <i>cert. denied</i> , 435 U.S. 950 (1978) .....	14
<i>Wong Yang Sung v. McGrath</i> , 339 U.S. 33 (1950) .....	16

CASESPAGE(S)STATUTES AND FEDERAL REGULATIONS

5 §554(d) .....	2, 9, 15, 17, 19, 20, 21
§556(d) .....	16
§557(d) .....	16
§3105 .....	16
§5372 .....	16
§7521 .....	16
15 U.S.C. §45 .....	2
18 U.S.C. §207 .....	19
28 U.S.C. §455 .....	23
§1254(1) .....	2
16 C.F.R. §4.1(b) .....	18
§4.1(b)(3) .....	20
Sup.Ct.R. 7 .....	20
Pub.L. 95-251, 92 Stat. 183 (1978) .....	16

OTHER AUTHORITIES

Final Report of the Attorney General's Committee on Administrative Procedure (1941), S.Doc.No. 8, 77th Cong., 1st Sess. (1941) .....	15, 16
FTC Letter of Sept. 29, 1975 to Robert W. Fleishman in <i>Exxon Corp.</i> , FTC Dkt. No. 8934 .....	18, 19
FTC Letter of Nov. 16, 1978 to Mark Tuller .....	18

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FEDERAL TRADE COMMISSION,  
*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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Petitioners Grolier Incorporated and fourteen of its wholly-owned subsidiary corporations (hereinafter collectively "Grolier") pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming and enforcing an order issued by the respondent Federal Trade Commission (hereinafter "FTC").

**OPINIONS BELOW**

The majority and dissenting opinions in the Court of Appeals (hereinafter "*Grolier II*"), reported at 699 F.2d 983 (9th Cir. 1983), are set forth in Appendix A. The Final Order of the Federal Trade Commission, reported at 99 F.T.C. 379 (1982), the original FTC opinion and order, reported at 91 F.T.C. 476 (1978), and other pertinent orders issued by the

respondent are set forth in Appendices B, D, E, and F. The initial opinion by the Court of Appeals (hereinafter "*Grolier I*"), reported at 615 F.2d 1215 (9th Cir. 1980), is contained in Appendix C.

## JURISDICTION

The Judgment of the Court of Appeals was entered on February 10, 1983, and amended on March 2, 1983. On April 11, 1983, a timely petition for rehearing was denied. App. G.<sup>1</sup> This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the First and Fifth Amendments to the United States Constitution which provide in relevant part:

"Congress shall make no law . . . abridging the freedom of speech or of the press . . .";

and

"No person shall be . . . deprived of . . . property, without due process of law . . ."

The statutory provisions involved are Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and Section 5(c) of the Administrative Procedure Act, 5 U.S.C. § 554(d).

The Federal Trade Commission Act states in pertinent part:

"(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

\* \* \* \* \*

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<sup>1</sup> References "App. A" are to Appendix A to the Petition in this case.

"(b) . . . If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice."

The Administrative Procedure Act states in pertinent part:

"An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency."

## STATEMENT OF THE CASE

Petitioners seek review of a judgment of the United States Court of Appeals for the Ninth Circuit affirming, with one judge dissenting, respondent's order compelling petitioners to make certain statements to prospective customers in their advertisements and promotional materials and in the sales presentations of their representatives. The order<sup>2</sup> also compels certain statements to be made to prospective sales employees prior to and during their employment interview.

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<sup>2</sup> The complete text of the order appears in Appendix B.

Petitioners challenge the order on two grounds. First, the entire order should be vacated because it was issued in violation of the Administrative Procedure Act and the due process clause of the Fifth Amendment, since the administrative law judge (hereinafter "ALJ") who issued the initial decision should have been disqualified from sitting on the case. Second, with respect to certain order provisions described below, the FTC exceeded its remedial authority and impinged upon rights guaranteed by the First Amendment by going beyond a simple cease and desist order without making specific findings regarding the necessity of such extraordinary affirmative relief ordered.

The FTC, in its opinion and order, failed to engage in the reasoned weighing of alternative methods of achieving the governmental purpose of preventing deception which petitioners and the public are entitled to expect where the provisions of that order invade petitioners' right to speak freely. No findings of fact were made during the administrative proceeding regarding the relative effectiveness in preventing deception of various alternative remedies proposed by petitioners. Had such findings been required, the FTC's failure to prove that its order was necessary to prevent deception would have been apparent.

This failure infects three of the order's provisions in particular, and requires a reversal of the affirmance of those provisions by the Court of Appeals. First, when making home visits, petitioners' sales representatives are required to present a 3-inch by 5-inch card to each prospective customer containing certain information including the statement: "The purpose of this representative's call is to solicit the sale of encyclopedias," in 10-point bold-face type. The card may contain no information other than that prescribed by the order.<sup>3</sup> App. B, 6-8.

Petitioners contended below that the FTC improperly failed to consider a number of alternative, less restrictive, non-deceptive disclosures that could be made upon initial contact between a prospective customer and a Grolier sales representa-

<sup>3</sup> Pursuant to a modification of the order, Petitioners are permitted for one year to use a 2 inch by 3½ inch card (business card size) without the above quoted language, and thereafter to request a permanent modification of the order. App. D, 4-5.

tive at the customer's home. In all cases Grolier would be prohibited from misrepresenting its purpose in visiting the customer.<sup>4</sup> One such suggestion consisted of an order prescribing certain affirmative disclosures, but permitting Grolier to determine the precise manner and method of making such disclosures. Such an order would assure that the prospective customer was told the sales purpose of the representative's call. Few, if any, people will let a stranger into their homes without first ascertaining the visitor's purpose. Given these circumstances, the 3-inch by 5-inch card, which Judge Wood, dissenting in *Encyclopaedia Britannica, Inc. v. FTC*, 605 F.2d 964, 977 (7th Cir. 1979) (Wood, J., dissenting), *cert. denied*, 445 U.S. 934 (1980), described as a "stark warning" and "abnormal and strange commercial behavior" that would suggest that the company was "afflicted with some strange marketplace malady," is unnecessary and unwarranted.<sup>5</sup>

Second, the order requires petitioners to warn prospective customers that their response to advertising or promotional materials may result in a sales representative calling on them. Three similar formats are permitted for this disclosure. App. B, 4-5. A representative example reads:

"1. **IMPORTANT:** This card will let you know of my interest and enable your [location designation, if appropriate] sales representative to

( contact me at home )                      ( information )  
 ( call or visit me ) with ( details )  
 ( contact me in person )                      ( facts )

on how I may ( purchase ) [applicable product]."  
 ( buy )

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<sup>4</sup> Order paragraph II(G)(1)(a) provides that Grolier must cease and desist from "[r]epresenting, directly or by implication, either orally or in writing that ... any person calling on any prospective purchaser is ... engaged in or connected with 'advertising,' 'marketing,' 'promotion,' 'education,' or anything other than the sale of encyclopedias or other educational or reference materials." App. B, 8.

<sup>5</sup> Since the order was issued in this case, the FTC found that *Encyclopaedia Britannica* had presented persuasive evidence that presentation of a business card would communicate the sales purpose of the call as well as the 3 inch by 5 inch card. *In the Matter of Encyclopaedia Britannica, Inc., et al.*, Docket 8908, Order of October 5, 1982; App. H, 2.

The FTC found that prospective customers who responded by sending in coupons were not informed that a sales representative might telephone or visit them personally to deliver further information or promotional gifts. It further found that the possibility of such a call was a material fact in the customer's decision to respond to the advertisement which must be disclosed. App. E, 8. Thus, it ordered the extensive warning quoted above to be disclosed in two places in each advertisement, once in the text of the advertisement and once on the coupon. The FTC gave no consideration to the size limitations of the coupon in relation to the length of the specified language. See *Memphis Publishing Co. v. Leech*, 539 F.Supp. 405, 411-12 (W.D.Tenn. 1982) (holding a Tennessee statutory warning excessive in size). Nor did the FTC consider petitioner's argument that a statement such as "our sales representative will call" would be sufficient to serve the ostensible purpose of this order provision.<sup>6</sup>

Finally, the order requires the inclusion of a number of disclosures in any advertisement offering employment involving door-to-door sales. Petitioners must disclose that their sole purpose in recruiting is to employ persons for sales or solicitation and that such sales will be on an "in home" basis. Further, petitioners must include in such advertising the nature of the products or services being sold and the basis of compensating such sales representatives. App. B, 2-3.

The ALJ found that because selling encyclopedias was considered by a substantial portion of the public to be a distasteful job, Grolier's advertisements, unlike normal help-wanted advertisements, must disclose various details about the job. These same details are also required to be disclosed at the initial employment interview. App. B, 2-3. Petitioners contended below that at the initial interview, all of the details of the job could be explained in a manner not possible in a help-

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<sup>6</sup> The FTC's modification of its *Encyclopaedia Britannica* order altered the like provision in that order to merely provide that Britannica not represent that a responding customer would not be contacted directly by a sales person. App. H, 4-5.

wanted advertisement. Therefore, the disclosure of the pertinent information, petitioners contended, should occur once at the interview, not twice as required by the order.<sup>7</sup>

The Court of Appeals' discussion of the recruitment advertising provision illustrates its failure to seriously consider petitioners' arguments. The Court of Appeals stated: "[r]equiring an employment advertisement to state the truth should not be overly burdensome to any recruitment effort." 699 F.2d at 988; App. A, 8. Of course this is true, and order paragraphs I(A) and I(B) prohibit Grolier from "misrepresenting in any manner, the job for which any person is being solicited," "the amount and type of training that will be given," "the purposes for which any person is engaged," and "the amount of income to be earned." App. B, 2. The real question, however, is whether the disclosures are necessary to prevent a prospective sales employee from being misled into accepting employment which differs from that which it is represented to be. This was the basis the FTC purportedly used to justify the provision. App. E, 4-5. Neither the FTC nor the Court of Appeals considered whether the advertising disclosures were a necessary supplement to the job interview disclosures in achieving this purpose.

### The FTC Proceedings

On March 9, 1972, the FTC issued a complaint against petitioners. At a hearing on January 14, 1976, petitioners were informed that the Honorable Theodor P. von Brand (the ALJ assigned to this proceeding who rendered the initial decision and order) had been employed by the FTC as an attorney advisor to former FTC Commissioner A. Everett MacIntyre for approximately eight years, from 1963 through January 1971. During much or all of that period, Grolier's practices, which eventually became the basis for the complaint in this proceeding, were being actively investigated by the FTC's staff and by the individual commissioners.

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<sup>7</sup> This provision was also modified in the *Encyclopaedia Britannica* order by the deletion of all mandated disclosures from the help-wanted advertisement except that Britannica must disclose that it "is recruiting persons for the sole purpose of soliciting or selling." App. H, 2.

Petitioners promptly requested that the ALJ disqualify himself from further participation in the proceedings, and sought discovery of certain FTC records related to the ALJ's duties as attorney-advisor. ALJ von Brand denied both requests, stating that while he did not recall working on matters involving petitioners, he could not say that he never saw or reviewed a circulation or staff recommendation relating to them. See App. F, 5. By order dated February 10, 1976, the FTC denied both the motion for disqualification and the related requests for discovery. *Grolier Incorporated*, 87 F.T.C. 179 (1976). On March 13, 1978, the FTC issued an order directing petitioners to refrain from continuing certain practices and ordering it to make certain disclosures in its sales and employee recruitment communications.

### Grolier I

Petitioners sought review in the Court of Appeals for the Ninth Circuit. The Court of Appeals reversed and remanded the FTC's order on the ground that it had improperly limited petitioners' discovery of the facts and circumstances surrounding ALJ von Brand's participation in the Grolier investigation while an attorney-advisor to Commissioner MacIntyre. *Grolier Incorporated v. FTC*, 615 F.2d 1215 (9th Cir. 1980); App. C. The Court of Appeals rejected the FTC's argument that the attorney-advisor's function is to advise, not to investigate or prosecute. App. C, 5. It also rejected petitioners' argument that the evidence sufficiently showed ALJ von Brand's involvement in the Grolier investigation to both create an appearance of impropriety and create a presumption of actual involvement in the investigation. App. C, 5, 8-9. The Court of Appeals held that it was incumbent upon petitioners to show that ALJ von Brand actually performed investigative functions, but that petitioners were entitled to further discovery from the FTC to uncover such actual involvement. App. C, 10-11.

### The FTC Proceedings On Remand

On remand, the FTC granted limited document discovery and filed inconclusive affidavits of ALJ von Brand and former Commissioner MacIntyre. It denied petitioners' requests for further relevant documents without any analysis of their relevancy and denied petitioners' requests for depositions of ALJ von Brand and others. The FTC denied these requests on the basis that it had determined that there was no basis for disqualification and that in its opinion the record was sufficient to make an accurate Section 554(d) determination. The FTC made no finding that the requested discovery was either irrelevant or privileged. App. F, 6-7.

After once again denying petitioners' motion to disqualify ALJ von Brand, the FTC invited petitioners to request modification of the original order in accordance with modifications granted to Encyclopaedia Britannica, Inc. in a companion proceeding. Certain requested modifications were adopted. App. D.

### Grolier II

Petitioners again sought review by the Court of Appeals for the Ninth Circuit, and on February 10, 1983, a divided panel affirmed the order as modified. *Grolier Incorporated v. FTC*, 699 F.2d 983 (9th Cir. 1983); App. A. The Court of Appeals affirmed the FTC's conclusion that further discovery on the disqualification issue was unnecessary. Judge Poole dissented, writing that the FTC should have allowed petitioners to depose former ALJ von Brand since "the average litigator [would] be very apprehensive when [an eight year attorney-advisor] now sits on the issues with which his principal had dealt." *Id.* at 987 (Poole, J., dissenting); App. A, 9.

On the ground that the FTC had found that petitioners' speech had been unlawful or misleading and thus constituted unprotected commercial speech, the Court of Appeals rejected petitioners' argument that the First Amendment limited the FTC's remedial power in this case. App. A, 6. Analyzing the

specific order provisions under a standard of review requiring that they bear only a reasonable relationship to the objectionable practice, the Court of Appeals affirmed the FTC's order. App. A, 7-8.

## REASONS FOR GRANTING THE WRIT

### **I. The Writ Should Be Granted Because The Judgment Below Conflicts With The First Amendment Principles Enunciated By This Court Applicable To Orders Restricting Commercial Speech.**

In *Central Hudson Gas Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), the Court explained the test by which the validity of a restriction on commercial speech was to be measured. First, the commercial speech must concern lawful activity and not be misleading. Next, the government interest asserted to justify the restriction must be substantial. If both of these requirements are met, the regulation is valid so long as it directly advances the governmental interest asserted and is not more extensive than necessary to serve that interest. Thus, the latter two parts of the four-part test only apply if the communication is not misleading. The Court of Appeals erroneously construed *Central Hudson Gas* as permitting Grolier's future speech to be restricted in any manner reasonably related to the violations the FTC found (including, presumably, an outright ban of both deceptive and non-deceptive speech), because Grolier's prior speech had been found by the FTC to have been misleading. This petition, however, does not challenge the FTC's power to restrict misleading speech. Such speech will be prevented by unchallenged provisions of the order prohibiting misrepresentations in Grolier's sales and employee recruitment materials. Rather, the issue is whether the FTC can restrict petitioners' future speech by requiring a particular disclosure, where other disclosures would both satisfy the purposes of the order and have less drastic effects on Grolier's business.

In such circumstances, the Court's four-part analysis (including the final part which provides that the restriction be no more extensive than necessary to serve the governmental interest) enunciated in *Central Hudson Gas* is applicable. The failure of the FTC and Court of Appeals to conduct this analysis warrants review by this Court. Indeed, *Central Hudson Gas* left open the question of whether "potentially" misleading speech requires different treatment from non-misleading speech. That question was answered in *In the Matter of RMJ*, 455 U.S. 191 (1982):

"[W]hen the particular content or method of the advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse, the states may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the states may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive. . . . Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception." (*Id.* at 937.)

Thus, even in potentially misleading speech cases, the restriction must be tailored to the prevention of deception. The most that can be said of petitioners' future speech in the circumstances of this case is that it is "potentially misleading." Surely, it has not already been condemned as actually deceptive.

A number of the challenged order provisions fail to satisfy the requirement set forth in *Central Hudson Gas* and in *RMJ* that they be no broader than reasonably necessary. In effect, the Court of Appeals has permitted the punishment of petitioners through an excessive restriction on its future speech, solely because the FTC found that Grolier had in the past made misleading statements. As stated in *United States v. Reader's Digest Ass'n*, 464 F.Supp. 1037, 1051 (D.Del. 1978), *aff'd*, 662 F.2d 955 (3d Cir. 1981), *cert. denied*, 455 U.S. 908 (1982): "[t]he fact that a violation of section 5 of the Act has been established, however, does not permit the Government to

ignore First Amendment interests." The FTC and the Court of Appeals did precisely this by ignoring the commands of the First Amendment solely because a violation of Section 5 had been established.<sup>8</sup>

## **II. The Writ Should Be Granted To Resolve A Conflict In The Decisions Of Various Courts Of Appeals Regarding The Standard Of Review To Be Applied To Federal Trade Commission Orders Restricting Speech.**

The Court of Appeals for the Third, Seventh, and District of Columbia Circuits, as well as two other panels of the Ninth Circuit, have required FTC orders which impinge upon the free speech of respondents to be "necessary" or "reasonably necessary" to achieve the governmental objective of eliminating deception, *i.e.*, that they contain the least restrictive alternative necessary to serve the governmental interest. These courts have modified FTC orders which failed to meet this test. The Court of Appeals here, however, applied the pre-*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), standard of review for FTC remedial orders, which merely requires that the remedy be "reasonably related" to the violation sought to be remedied. It thus failed to recognize any limiting impact exerted by the First Amendment on the FTC's remedial powers. As the cases discussed below show, no other court has failed to recognize some limitation on the FTC's remedial authority, based upon First Amendment concerns.

In *Beneficial Corp. v. FTC*, 542 F.2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977), the FTC ordered Beneficial to cease using the terminology "instant tax refund." Beneficial argued unsuccessfully before the FTC that it should be permitted to utilize the slogan with the addition of qualifying language to prevent readers from being misled into believing

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<sup>8</sup> That the FTC views its remedial powers as untouched by the First Amendment is indicated by its decision in *The Kroger Company*, 98 F.T.C. 639, 756 n.46 (1981). There, the FTC did not reach Kroger's constitutional claims, because it found that its order was the least restrictive alternative. The FTC noted, however, that the remedy was designed in this manner to allow flexibility, not because of any compulsion due to constitutional constraints.

that the "instant tax refund" was different from Beneficial's ordinary consumer loans. The FTC rejected this argument, stating that the only possible remedy was the total prohibition of the offending phrase. The Court of Appeals for the Third Circuit set aside the ban on the words "Instant Tax Refunds" and remanded the case to the FTC. The court, recognizing that a mere "reasonable relationship" between the violation and remedy was insufficient, held:

"We do not believe that the Commission's conclusion as to the capacity of qualifying language to apprise Beneficial's audience of the true nature of the offered service can be sustained. We acknowledge, of course, that we are ordinarily obliged to defer broadly to the Commission's exercise of informed discretion in framing remedial orders that bear some rational relationship to the removal or prevention of an established violation. . . . But we are dealing in this case with the government regulation of a form of speech. *The first amendment requires, we believe, an examination of the Commission's action that is more searching than in other contexts.*

"It is now established beyond dispute that there is no commercial speech exception to the first amendment. . . . That does not mean that an advertiser may engage in speech that is an essential part of a scheme to violate an otherwise valid law. . . . It does mean that the remedy for the perceived violation can go no further in imposing a prior restraint on protected commercial speech than is reasonably necessary to accomplish the remedial objective of preventing the violation." (542 F.2d at 618-19; citations omitted; emphasis added.)

The Third Circuit has more recently held that despite the FTC's broad remedial powers, the First Amendment requires that a remedy be no more restrictive than "reasonably necessary" for the prevention of future violations. *American Home Prods. Corp. v. FTC*, 695 F.2d 681, 713 & n.50 (3d Cir. 1982) quoting *United States v. Reader's Digest Association*, 662 F.2d 955, 965 (3d Cir. 1981), *cert. denied*, 455 U.S. 908 (1982).

In *Warner-Lambert Co., Inc. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978), the court held that the FTC ordered disclosure—"contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity"—had to be modified by deleting the confessional preamble, "contrary to prior advertising." The intended purpose of the preamble was to draw attention to the correction which followed. Since that purpose was served by other provisions of the order relating to conspicuousness, the preamble was unnecessary and unwarranted. *Id.* at 763.

In *Standard Oil Co. of California v. FTC*, 577 F.2d 653 (9th Cir. 1978), the Ninth Circuit reviewed an FTC order which, based upon the finding of three deceptive advertisements concerning one product, restricted the advertising of all of Standard Oil's products. The court modified the order, in part because of First Amendment concerns:

"Moreover, first amendment considerations dictate that the Commission exercise restraint in formulating remedial orders which may amount to a prior restraint on protected commercial speech. . . . Although it is generally accepted that false commercial advertising may be prohibited . . . these orders go far beyond elimination of the specific misrepresentations which were made and also beyond what in fairness could be deemed necessary to deter future unlawful conduct. . . . At a minimum, administrative agencies may not pursue rigorous enforcement to the extent of discouraging advertising with no concomitant gain in assuring accuracy and truthfulness." (*Id.* at 622; citations omitted.)

Other courts have also stated that an FTC remedy can go no further than reasonably necessary to prevent future deception. *Litton Industries, Inc. v. FTC*, 676 F.2d 364, 373 (9th Cir. 1982); *National Commission on Egg Nutrition v. FTC*, 570 F.2d 157, 161-62 (7th Cir. 1977) *cert. denied*, 439 U.S. 821 (1978); *Encyclopaedia Britannica, Inc. v. FTC*, 605 F.2d 964, 972-73 (7th Cir. 1979), *cert. denied*, 445 U.S. 934 (1980).

**III. The Writ Should Be Granted To Decide An Important Question Of Federal Law Regarding The Reach Of The Prohibition Against Commingling Of Functions Within An Administrative Agency.**

The ALJ who issued the initial decision in this proceeding should have been disqualified. For the ALJ to preside after having served as an attorney-advisor to one of the FTC Commissioners during a period when that Commissioner performed many investigative and prosecuting functions with respect to petitioners constituted an impermissible commingling of investigative (or prosecutorial) and adjudicative functions, in violation of 5 U.S.C. § 554(d).

Under Section 5(c) of the Administrative Procedure Act (hereinafter "APA"), 5 U.S.C. §554(d), employees of the FTC are prohibited from participating or advising in adjudicative decisions or recommended decisions in any case in which they have also engaged in "investigative or prosecuting functions." One of the principal purposes underlying this section is that decisions are to be based upon record evidence. The *Final Report Of The Attorney General's Committee On Administrative Procedure* (1941), the major study upon which the present Administrative Procedure Act was based, states:

"It is clear that when a controversy reaches the stage of hearing and formal adjudication, the persons who did the actual work of investigating and building up the case should play no part in the decision. This is because the investigators, if allowed to participate, would be likely to interpolate facts and information discovered by them ex parte and not adduced at the hearing, where the testimony is sworn and subject to cross-examination and rebuttal. (Report of the Attorney General's Committee on Administrative Procedure 56 (1941), S. Doc. No. 8, 77th Cong., 1st Sess. 50 (1941).)

Based upon the Committee's recommendations, the APA gives hearing examiners, now ALJs, a special place in the administrative process. Unlike the agency heads who are the policy-makers of the agency, the ALJs were recommended to be a

"separate unit in each agency's organization" with "no functions other than those of presiding at hearings... and ... deciding the cases that fall within the agency's jurisdiction." *Id.* at 50.<sup>9</sup>

Since this procedural scheme, including the separation of functions provisions, was designed to maintain public confidence in the fairness of the agency's processes as well as actually forestall unfairness, the Court has concluded that it is the duty of the courts "to construe [the APA] to eliminate, so far as its text permits, the practices it condemns." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 42-46 (1950). See also *Amos Treat & Co. v. Securities and Exchange Commission*, 306 F.2d

<sup>9</sup> The Act provides extensive protection to ALJs from undue influence by other employees of the agency with which they are employed. It provides for the taking of evidence by an ALJ who is (1) "assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as hearing examiners" (5 U.S.C. §3105); (2) only subject to removal, suspension, reduction in grade or pay "for good cause established and determined by the Merit Systems Protection Board" (5 U.S.C. § 7521); and (3) "entitled to pay prescribed by The Office of Personnel Management independently of agency recommendations or ratings" (5 U.S.C. §5372). Additionally, the APA requires that the public record constitute the exclusive record for decision (5 U.S.C. §556(d)), and that the ALJ not consult with or be responsible to an employee engaged in the prosecuting or investigative functions (5 U.S.C. §554). Finally, it protects the ALJ from *ex parte* contracts by persons both within and outside the agency (5 U.S.C. §557(d)).

In *Butz v. Economou*, 438 U.S. 478 (1978), the Court recognized the central place ALJs hold in the administrative adjudicative process. In holding that ALJs are entitled to absolute immunity from damage liability for their judicial acts, this Court stated that there could be little doubt that ALJs were "functionally comparable" to federal judges. It detailed the provisions of the APA which were incorporated to secure fair and competent hearing personnel since that was viewed as "the heart of formal administrative adjudication." *Id.* at 514, quoting *Final Report of the Attorney General's Committee on Administrative Procedure* 46 (1941). The Court of Appeals for the Second Circuit has described these protections as a "comprehensive bulwark to protect ALJs from agency interference" in order "to maintain public confidence in the essential fairness of the process." *Nash v. Califano*, 613 F.2d 10, 16 (2d Cir. 1980). Accord, *U.S. Health Club, Inc. v. Major*, 292 F.2d 665, 666-67 (3d Cir.), cert. denied, 368 U.S. 896 (1962). Congress gave administrative law judges enhanced stature in 1978 when it adopted the Civil Service Commission's change in titles from "hearing examiners" to "administrative law judges." Pub.L. 95-251, 92 Stat. 183 (1978), codified in 5 U.S.C. §3105 note.

260 (D.C. Cir. 1962). As the following discussion shows in order to dispel the improper appearances which the APA condemns, the "engaged in the performance of investigation or prosecuting functions" language of Section 5(c) of the APA should be construed as including attorney-advisors of FTC Commissioners engaged in those functions.

The Court of Appeals in *Grolier I*, however, held

"that under 554(d), attorney-advisors are 'precluded only from participating in the adjudication of cases in which they have actually performed such ['investigative and prosecuting'] functions, and in 'factually related' cases.'" (615 F.2d at 1221; App. C, 9; quoting *Au Yi Lau v. I.N.S.*, 555 F.2d 1036, 1043 (D.C.Cir. 1977))

In so holding, the court rejected petitioners' argument that the ALJ should be charged with participation in the investigation or prosecution of petitioners during his tenure as attorney-advisor because his commissioner had so participated.<sup>10</sup> Petitioners submit that the Court of Appeals' construction of the statute does not "eliminate, so far as the text permits, the practices it condemns."

The close relationship between attorney-advisors and commissioners within the FTC has been well-documented in FTC responses to former attorney-advisors requesting to participate in FTC proceedings on behalf of respondents. Former Chairman Phillip Engman wrote:

"An attorney-advisor is a confidential assistant, outside any chain of authority and answerable only to his Commissioner. He occupies a uniquely sensitive position because he typically has access to the whole of his Commissioner's business and his opportunity to witness Commission decision-making is unparalleled. In my judgment, an attorney-advisor performing his typical function can scarcely avoid contact with each major issue coming before

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<sup>10</sup> The court misconstrued petitioners' argument to state that the ALJ is chargeable with all investigative and prosecutorial activities undertaken by the FTC, as opposed to his individual Commissioner. The court, thus, concluded that petitioners were arguing for *per se* disqualification by virtue of the ALJ's former position. 615 F.2d at 1221; App. C, 5, 8-9.

the Commission. For that reason, I believe Commissioners' confidential advisors have an ethical responsibility as stringent as that of the Commissioners themselves, and I generally would charge an attorney-advisor with the same inside knowledge chargeable to his Commissioner." (FTC letter of September 29, 1975, to Robert W. Fleishman, Esq., regarding *Exxon Corp.*, Docket No. 8934; App. I.)

The full FTC has since recognized the appropriateness of Chairman Engman's comments.<sup>11</sup> In a letter to Ms. Nancy Buc, a former attorney-advisor to Chairman Kirkpatrick, the FTC denied a request to participate in *National Talent Associates, Inc.*, [1976-79 Transfer Binder] Trade Reg. Rep. (CCH) ¶21,366 (1977). Ms. Buc had stated that she had no knowledge of the National Talent Associates matter during her tenure at the FTC. The FTC, in denying her clearance to appear before it, replied:

"An attorney-advisor has an opportunity for in-depth exposure to the full range of confidential information which comes before the Commission. *The close relationship which typically exists among a Commissioner and his or her staff, together with an attorney-advisor's customary attendance at Commission meetings, warrants the not un-*

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<sup>11</sup> The Court of Appeals without discussion held that the decisions regarding attorney clearance "are not authority for a *per se* approach in the altogether different area of disqualification." 615 F.2d at 1221, n.6; App. C, 8-9. Although the Court of Appeals did not disclose its rationale for this assertion, the FTC had once claimed that "the clearance rules concern impropriety resulting from access to inside information whereas the principal question involving an ALJ's participation is one of bias or prejudgment." *The Kroger Company*, Dkt. 9102 (Feb. 1, 1979). The assumption that an ALJ's disqualification does not result from access to inside knowledge was rejected in *Grolier I*. Nevertheless, the Court of Appeals offered no other analysis which justifies distinguishing the disqualification of an attorney from that of an ALJ.

The *Grolier I* court also noted that these clearance rules were no longer followed even in the clearance context citing a letter from the FTC to Robert Wald of August 16, 1978. App. K. The Wald letter, however, distinguished earlier clearance decisions on the basis that the information to which the former attorney-advisor had access could confer no present advantage within the meaning of the clearance rules. 16 C.F.R. 4.1(b). See letter from FTC to Mark Tuller (Nov. 16, 1978); App. M. (following *National Talent Associates* and denying clearance).

*reasonable public perception that the advisor either has some involvement in or knowledge of all matters reviewed in the Commissioner's office.*" (Emphasis added.)<sup>12</sup>

Petitioners submit that given the nature of their functions, former attorney-advisors should not be permitted to later serve as administrative law judges in cases where they or their commissioners had performed investigative or prosecuting functions. Such a rule avoids much of the need to examine the internal operations of the Commissioner's offices as well as dispelling doubt created by the failure to be able to thoroughly discover those internal operations. Judge Poole, dissenting in *Grolier II*, stated: "But I question whether having to proceed in the light of Judge von Brand's prior relationship as attorney-advisor for eight years during former Commissioner MacIntyre's tenure would not cause the average litigation to be very apprehensive when that attorney-advisor now sits on the issues with which his principal had dealt." 699 F.2d at 989 (Poole, J., dissenting); App. A, 9.

As indicated earlier, public confidence in the decision-making process was of major concern to the drafters of the Administrative Procedure Act. The public, in viewing the circumstances of this case, like the clearance cases, can "look only to the kind of position the employee occupied and the kind of inside information he was likely to be exposed to in that position." See FTC Letter of September 29, 1975, to Robert W. Fleishman, Esq., regarding *Exxon, et al.*, Docket No. 8934; App. I, 2. Indeed, the FTC has adopted such a presumption of exposure to non-public information in its clearance rules adopted after the passage of the Ethics in Government Act, 18

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<sup>12</sup> The Court of Appeals in *Grolier I* recognized the close relation between agency members and their attorney-advisors. In *dictum*, the court stated that the exemption "from the 554(d) prohibition by APA language immunizing 'the agency or a member or members of the body comprising the agency'" (615 F.2d at 1220; App. C, 8) applies to attorney-advisors because of their "necessarily close relationship" to their "agency members." *Id.* Thus, while finding that the relationship between attorney-advisors and their commissioners was such to treat them as one and the same for certain Section 554(d) purposes, the Court of Appeals refused to permit such treatment in inferring the attorney-advisors' participation in investigative or prosecutive functions.

U.S.C. § 207. See 16 C.F.R. § 4.1(b)(3).<sup>13</sup> Imputation of inside information is common in other disqualification contexts as well. For example, "confidential information presumptively possessed by . . . [one attorney] would be imputed to the other members of the . . . firm" for the purpose of attorney disqualification. *Schloetter v. Railloc of Indiana, Inc.*, 546 F.2d 706, 710 (7th Cir. 1976).

The ALJ in the proceedings below did not deny having participated in matters involving petitioners; he merely could not recall whether he had or had not; similarly, no explicit denial of participation came from the Commissioner under whom he served.<sup>14</sup> Furthermore, the structure of the FTC, as described in the clearance letters quoted above, indicate that in the normal course of events the ALJ would have come into contact with the Grolier investigations during his eight year tenure as attorney-advisor. Not only were numerous Grolier-related matters before the Commission (and Commissioner MacIntyre in particular) during those years, but also extensive investigations of nearly every door-to-door encyclopedia sales company were being conducted.

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<sup>13</sup> Supreme Court Rule 7 also recognizes the improper appearances created by a law clerk later participating in a case that was pending during the clerk's tenure. The Court in *Fredonia Broadcasting Corp., Inc. v. RCA Corp.*, 569 F.2d 251 (5th Cir. 1978), described the special place law clerks hold in the judicial system. The Court noted that the Courts of Appeals of the First Circuit and the District of Columbia have rules similar to that of this Court, and the practice of the Tenth Circuit and various district courts is the same although they have not promulgated formal rules. *Id.* at 255 n.5.

<sup>14</sup> In *Grolier I*, the Court of Appeals held that the FTC must disclose "sufficient information to permit it and a reviewing court to make an accurate 554(d) determination." 615 F.2d at 1222; App. C, 10. On remand, the FTC disclosed some documents and two affidavits by ALJ von Brand and former Commissioner MacIntyre. The former commissioner stated that ALJ von Brand had been assigned exclusively to formal matters (i.e., matters in which a complaint had been filed) while serving as attorney-advisor. The ALJ, however, stated that he had engaged in the normal functions of an attorney-advisor, including informal matters. Neither affiant could recall whether the ALJ participated in or reviewed circulations concerning any Grolier matter. In *Grolier II*, the Court of Appeals stated that ALJ von Brand's declaration

(Footnotes continued on following page)

#### IV. The Writ Should Be Granted To Decide An Important Issue Arising Under The Due Process Clause Of The Fifth Amendment Regarding The Commingling Of Prosecutorial And Judicial Functions In A Single ALJ.

Petitioners submit that even if the ALJ who presided over this proceeding was not disqualified pursuant to the APA, the Due Process Clause of the Fifth Amendment mandated that disqualification. In *Amos Treat & Co. v. SEC*, 306 F.2d 260 (D.C.Cir. 1962), the Court of Appeals for the District of Columbia held that in order to comport with due process, an administrative hearing "must be attended, not only with every element of fairness but with the very appearance of complete fairness."

" 'At the very least, quasi-judicial proceedings entail a fair trial. As the Supreme Court has said in another context:

" 'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. *But our system of law has always endeavored but to prevent even the probability of*

*(Footnotes continued from preceding page)*

"disclaimed receiving any ex parte information." 699 F.2d at 986; App. A, 3. On the contrary, ALJ von Brand's stated that he could not rule out the possibility that he reviewed a circulation or staff recommendation relating to petitioners. The Court of Appeals, over Judge Poole's dissent, held that the FTC had produced sufficient information to show that ALJ von Brand had not been "involved in the Grolier investigation." 699 F.2d 987; App. A, 4. The showing made by the FTC was plainly insufficient to make a Section 554(d) determination. Given such conflicting and inconclusive affidavits, the proper procedure would have been to allow further inquiry into the nature of ALJ von Brand's duties as attorney-advisor. The Commission's complete foreclosure of such further inquiry was in derogation of the duty imposed upon it by *R. A. Holman & Co. v. SEC*, 366 F.2d 446, 453 (2d Cir. 1966), *modified*, 377 F.2d 665 (2d Cir.), *cert. denied*, 389 U.S. 991 (1967), cited with approbation in *Grolier I*, 615 F.2d at 1222; App. C, 11. ("If the Commission had refused to divulge *anything* at all about the nature of the preliminary investigation . . . this would be an unfair restriction of an inquiry into possible disqualification. . . ")

unfairness.' " ( *Id.* at 263, citing *In re Murchison*, 349 U.S. 133 (1955); emphasis added.)<sup>15</sup>

The appearance of propriety requires that administrative decision-makers have no prior contact with the facts obtained through the agency's investigation or prosecution of the case, except through proceedings conducted on the record. Even the reasonable possibility that ALJ von Brand obtained facts prior to the hearing through his investigative or prosecutive functions as Commissioner MacIntyre's attorney-advisor is sufficient to create an appearance of impropriety.

The ALJ's position as attorney-advisor assigned to informal matters closely identifies him with a person directly charged with investigating and prosecuting petitioners. For such a person to later function as ALJ (a position the APA goes great lengths to protect from agency influence) creates the sort of distrust in the system which the appearance of propriety standard is designed to forestall.

An appearance of impropriety can be created by an individual's position, even absent any actual involvement in the case. In *American General Ins. Co. v. FTC*, 589 F.2d 462 (9th Cir. 1979), the court held that an administrative decision-maker was not qualified to participate in proceedings where he had acted as counsel in earlier proceedings. The Court stated:

"That the judge's or quasi-judicial officer's participation in the case as counsel may have been superficial rather than substantial does not affect the applicability of the principle. In [*Trans World Airlines, Inc. v. CAB*, 254 F.2d 90 (D.C. Cir. 1958)], the member of the Civil Aeronautics Board there found to be disqualified had signed a brief in the same case which argued different questions than those involved in the proceeding upon which he sat after his

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<sup>15</sup> See also e.g., *American Cyanamid Company v. FTC*, 363 F.2d 757, 767 (6th Cir. 1966); *Trans World Airlines, Inc. v. CAB*, 254 F.2d 90, 91 (D.C. Cir. 1958); *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583 591 (D.C. Cir. 1970); *Texaco, Inc. v. FTC*, 336 F.2d 754, 760 (D.C. Cir. 1964), vacated on other grounds, 381 U.S. 739 (1965); *Pregent v. New Hampshire Dept. of Employment Security*, 361 F.Supp. 782, 797 (D.N.H. 1973).

appointment to the CAB. . . . As previously noted, it has been the uniform practice of Supreme Court Justices to decline participation in cases pending in the Department of Justice during their tenure as Attorney General. In many such cases it is probably true that the Attorney General personally took no substantial part whatever in actually working on the case. But his mere responsibility for administrative supervision of the Department, regardless of the extent of his knowledge and his approval of the acts of his subordinates, has been deemed sufficient to activate the disqualification rule." (589 F.2d at 464-65; footnote omitted.)

The Court of Appeals below held that any appearance of impropriety was dispelled by the affidavits of former Commissioner MacIntyre and ALJ von Brand. *Grolier II*, 699 F.2d at 987. However, neither of those affidavits contained a denial of involvement in the investigation or prosecution of petitioners. Both affiants could only state that they could not recall ALJ von Brand being involved. Under an appearance of impropriety standard, it does not matter what ALJ von Brand might subjectively believe about how his prior role as an attorney-advisor did or did not affect his ability to give petitioners a fair trial. Rather, the test is whether a reasonable person would find improper ALJ von Brand's presiding over the *Grolier* matter. Indeed, in judicial disqualification cases arising under 28 U.S.C. § 455—which incorporates an "appearance of impropriety" test—judges routinely recuse themselves even though they believe they could give an objecting party a fair and impartial trial. *E.g.*, *Roberts v. Ace Hardware, Inc.*, 515 F.Supp. 29, 31 (N.D. Ohio 1981); *Hampton v. Hanrahan*, 499 F.Supp. 640, 645 (N.D. Ill. 1980); *Marshall v. Georgia Pacific Corp.*, 484 F.Supp. 629, 631 (E.D. Ark. 1980). See *United States v. Amerine*, 411 F.2d 1130, 1133 (6th Cir. 1969).

## CONCLUSION

For the reasons expressed above, the petition for a writ of certiorari should be granted.

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